No. 82-1169

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

CPC INTERNATIONAL INC.,
Petitioner

VS.

DIMMITT AGRI INDUSTRIES, INC.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Was the Court of Appeals empowered to remand this case to the District Court for a new trial on the attempt to monopolize claim upon its finding that such a remand was the only remedy consistent with justice?

2. Does the remand issued by the Court of Appeals for a new trial on the attempt to monopolize claim deprive CPC of any right guaranteed to it under the Seventh Amendment to the United States Constitution?

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

Constitution

Statutes

Rules

TABLE OF AUTHORITIES CITED

Other Authorities

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BRIEF IN OPPOSITION

The instant petition for certiorari represents a frontal attack on the power of this Court and other Courts of Appeals to correct injustice, and unwarrantedly questions the constitutionality of new trials ordered pursuant to Rule 50(d) of the Federal Rules of Civil Procedure. The petition fails to satisfy any of the criteria enumerated in Rule 17 of the Rules of this Court and is without merit. Accordingly, and under well-settled doctrines pertinent to those circumstances under which review by certiorari is appropriate, the Court ought not to in this instance allow issuance of its writ.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. 28 U.S.C. § 2106 provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

2. Rule 50(d) of the Federal Rules of Civil Procedure provides:

> "If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted."

3. The Seventh Amendment to the United States Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

Respondent obtained a jury verdict against CPC on a claim that CPC had monopolized interstate trade in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. The jury at the same time, and after having found monopolization, answered a special interrogatory, finding that CPC had not attempted to monopolize a relevant market in violation of Section 2 of the Sherman Act.

CPC moved the District Court for judgment notwithstanding the jury verdict. The District Court denied the motion for judgment n.o.v. and, on August 29, 1980, entered judgment on the jury verdict in favor of respondent. CPC appealed from the verdict and judgment.

On July 2, 1982, the Fifth Circuit Court of Appeals reversed the District Court's judgment on respondent's monopolization claim and, pursuant to F.R.Civ.P. Rule 50(d) and its inherent power to correct manifest injustice, remanded the case to the District Court for a new trial on respondent's attempt to monopolize claim, finding that to be "the only remedy consistent with justice" 679 F.2d 516, 533.

REASONS FOR DENYING THE WRIT

The ruling of the Court of Appeals is entirely consistent with the uniform holdings of this and other Courts that a Federal Court of Appeals has the power to order a new trial on its own motion and in avoidance of manifest injustice. In this case, respondent specifically requested a new trial "should the Court of Appeals consider reversing the District Court's judgment entered on respondent's monopolization claim. [*Brief of Appellee*, p. 2]. CPC was

afforded a full and adequate opportunity to address, brief and argue the propriety of respondent's request for a new trial. No procedural impropriety was committed on this point, and the Court of Appeals acted well within its power and discretion in ordering that a new trial go forward. Indeed, even had respondent not suggested the appropriateness of a new trial, the Court of Appeals was, given the fact that the District Court's judgment was lawfully before it for review, fully empowered to order a new trial on the attempt to monopolize claim. Finally, the order granting a new trial does not "reverse" the jury verdict in this case, and cannot be characterized as an unconstitutional or otherwise impermissible re-examination of the jury's verdict.

A. The Court of Appeals Below was Clearly Empowered to Remand the Case for a New Trial on the Attempt to Monopolize Claim

Contrary to the suggestion made by CPC, the entire judgment entered by the District Court was before the Fifth Circuit on appeal. The fact that respondent did not file a formal cross-appeal from the jury finding on the attempt to monopolize claim did not deprive the Court of Appeals of its power to both consider the propriety of and order a new trial on that claim. As stated by Professor Wright:

> "Occasional statements may be found that the absence of a required appeal deprives the court of jurisdiction to consider the questions that should have been so raised, or even that the appellee lacks 'standing' to raise questions not framed by cross-appeal. The predominant view, however, is that in appropriate circumstances the requirement can be ignored. This view

finds some support in Supreme Court practice, and surrounding statements that appear to embrace appeals to courts of appeals.

"It seems better to recognize a power to modify a judgment in favor of a nonappealing party. This view is easiest to justify with respect to matters going to jurisdiction, or any other matters so important that a court is justified in raising them on its own motion. Even with respect to issues raised by an appellee, there may not be a great interest in fostering the appellant's sense of repose in whatever partial victory seems assured by the lack of formal cross-appeal. More important, there seems to be little functional justification for the cross-appeal requirement. . . . Recognition of a *power*, finally, need not lead to its profligate use. In one recent opinion, the Court of Appeals for the Second Circuit stated that if an issue were before it, there would be no difficulty in finding error; that the cross-appeal requirement may well be a rule of practice that may be disregarded; but that there was no sufficient reason to disregard it in the circumstances presented. Such restrained use of the power may provide justice in particularly worthy cases without disrupting the normal flow of appellate business or the important expectations of the parties.

"The power to modify a judgment adversely to the appellant, without a cross-appeal, has been expanded to allow reversal even in favor of parties who did not participate at all in the appeal." [footnotes omitted][1]

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[1]15 C. Wright, A. Miller, & Cooper & E. Gressman, Federal Practice and Procedure § 3904, at 416-418.

Professor Moore's treatise on federal practice is, on this point of appellate power, entirely in agreement with the view espoused by Professor Wright:

> "The principle . . . that a judgment will not be set aside or altered on appeal in favor of a person who has not filed a timely notice of appeal, whether an appellee or a co-party of the appellant . . . is clearly *not required* by the provisions of Article III or [28 U.S.C.] § 1291, however, since both these provisions, as interpreted, deal with whole cases."[2]

In *Langes v. Green*, 282 U.S. 531 (1931), this Court specifically observed that none of the cases dealing with the scope of appellate review:

> "[D]enying the *power* of the Court to review objections urged by respondent, although he has *not* applied for certiorari, if the Court deems there is good reason to do so." *id* 538[3]

A federal Court of Appeals clearly has the power to itself modify a judgment of a District Court lawfully before it *without* reversing or remanding the case to the District Court *Gladney v. Review Committee*, 257 F.Supp.

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[2]9 J. Moore, B. Ward & J. Lucas, Moore's Federal Practice ¶ 204.11[5], at 4-56 to 4-57 (2d Ed. 1982). The 1937 decision of this Court in *Morley Const. Co. v. Maryland Casualty Co.*, 300 U.S. 185 is not to the contrary. In *Morley* Justice Cardozo speaks in terms of the *rights* of litigants as distinguished from the *power* of appellate courts *id* 190-192. Neither does this Court in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) do anything other than, for reasons sufficient unto it, decline to *exercise its power* to review and consider matters not raised in the petition for certiorari.

[3]*See also: Bryant v. Technical Research Co.*, 654 F.2d 1337 (9th Cir.) 1981; *Scott v. University of Delaware*, 601 F.2d 76, 82-83 (3rd Cir.) 1979.

57; *aff'd* 380 F.2d 929; *cert. den.* 389 U.S. 1036. Indeed, Appellate Courts have both the power and the duty to reverse judgments and order new trials where, as here, a manifest miscarriage of justice has plainly occurred. *Knight v. United States,* 213 F.2d 699 (5th Cir.) 1954.

B. The Remand Issued By The Court Of Appeals For A New Trial On The Attempt To Monopolize Claim Does Not Deprive CPC Of Any Right Guaranteed To It Under The Seventh Amendment To The United States Constitution

CPC appears to assert that in ordering a new trial the Court of Appeals impermissably re-examined some fact or facts determined by the jury in a manner which does not comport with the Seventh Amendment. The Court of Appeals did no such thing.

The power of Courts to order new trials in appropriate cases is one which existed at common law[4] at the time our Constitution was adopted and ratified, *National Car Rental System Inc. v. Better Monkey Grip Co.,* 511 F.2d 724 (5th Cir.) 1975. There is no authority for a contention that Courts of Appeals presently suffer any absence of jurisdiction in this regard, nor is there any authority for CPC's assertion that the action taken by the Fifth Circuit was in any way improper or impermissable. In fact, the authority relied upon by CPC, *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.,* 369 U.S. 355 (1962), doesn't even deal with the granting of a new trial.

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[4]11 C. Wright & A. Miller, Federal Practice & Procedure, § 2801 at 27-35 [1971]; 9 C. Wright & A. Miller, Federal Practice & Procedure, § 2531 at 575-578 [1971]; *and see Gasoline Products Co. v. Champlin Refining Co.,* 283 U.S. 494 (1931).

After first discussing generally the reasons for and constitutionality[5] of a power vested in Federal Courts to grant new trials and partial new trials, Professor Moore speaks to the power of Courts of Appeals to order new trials thusly:

> "Whether an appellate court should grant a new trial as to all or only some of the parties is a matter resting within its discretion. Similarly, it has a large discretion to grant a new trial as to all the issues, or a partial new trial. If the issues are interwoven, then a new trial as to all of the issues should be ordered. On the other hand if the error below did not extend to the whole judgment but only to a particular issue(s) and this is sufficiently separate so that a fair trial may be had as to it alone, the appellate court may grant a partial new trial limited to such separate issue." (footnotes omitted)[6]

The power of the Court of Appeals to remand for a new trial is in no way dependent upon the exercise or non-exercise by the District Court of its power to grant a new trial under Rule 59 of the Federal Rules of Civil Procedure, and CPC cites no authority in support of this proposition. Nor does CPC provide any authority for its assertion that "a Court of Appeals may not *sua sponte* reverse a jury finding that has not been appealed unless such action is unavoidably necessary to the Court's determination of the matter on appeal." [*Petition*, p. 10].

Firstly, the "matter on appeal" was the judgment entered by the District Court, and the entire judgment was lawfully before the Fifth Circuit. CPC's attempt, made elsewhere, to substitute the term "issues" for the statutory

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[5]See: 6A J. Moore, B. Ward & J. Lucas, Moore's Federal Practice ¶¶ 59.05-59.06 (2d Ed. 1982).

[6]*Id*, ¶ 59.06 at 59-64—59-67.

terms included in 28 U.S.C. § 2106 *viz*, "judgment, decree or order" is improper and ought to be summarily rejected.[1] Secondly, and more importantly, the argument made by CPC is defeated by the plain language of both 28 U.S.C. 2106 and F.R.Civ.P., Rule 50(d). Lastly on this point, the Court of Appeals remand for a new trial does not "reverse" any finding made by the jury. Were it otherwise, respondent could and would simply apply to the District Court for entry of a judgment in its favor on the attempt to monopolize claim, without the necessity for a new trial and a new jury determination on that claim. In the instant case, a new trial is plainly required to, among other things, address and cure the erroneous evidentiary exclusions that attended upon the first trial, and upon which the jury verdict was based [*Brief of Appellee*, p. 2; 679 F.2d 516, 527].

CPC's discussion of the "differences between the intent and power requirements for the monopolization and attempt to monopolize offenses" [*Petition*, pp. 12-16] is pure obfuscation. Neither it nor the wholly argumentative evidentiary review contained in CPC's "statement of the case" need be addressed, since neither are pertinent to the questions presented on the instant petition, and both constitute legal sophistry of the highest order. Respondent does reject the notion that the jury could not have found that CPC both attempted to monopolize and monopolized during the time period relevant to this case.

The fact is that Courts of Appeals plainly and properly possess both statutory and inherent power to order new trials on their own motion, and nothing recited by CPC

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[1] *See:* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Columbia Law Review, 527, 543-544 (1947).

demonstrates or even supports the contrary proposition. The Fifth Circuit clearly had the power to remand this case for a new trial on the attempt to monopolize claim, and it would have been a clear abuse of its discretion not to have done so.

CPC fails to demonstrate any impermissible re-examination or reversal of the jury's verdict in this case. The Fifth Circuit Court of Appeals Order of Remand was well within its power and within the exercise of its sound discretion, and is not properly subject to review or reversal.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated: February 8, 1983.

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